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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 707

E. Totonelly Sons, Inc., Petitioner

v.

Town of Fairfield, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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March 5, 1962

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QUESTIONS PRESENTED

1. Whether the Court of Appeals in this case decided an important state question in a way in conflict with applicable state law or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

2. When does the ninety day period for filing a petition for certiorari to the United States Court of Appeals begin to run where:

(A) After the time for filing a petition for rehearing has expired, under local court rules, and more than ninety days after the entry of that court's judgment, a motion for leave to file a petition for rehearing is filed with a copy of the proposed petition attached,

(B) In accordance with local rule, the motion for leave is assigned to the three judges who originally heard the appeal, and they deny the motion,

(C) The petition for rehearing is itself considered only to the extent necessary for the Chief Judge to deny the petition in accordance with local rule on the ground that no active circuit judge had requested a rehearing in banc.

RULE INVOLVED

[In addition to Rule 19 of this Court's Revised Rules printed in the petition for certiorari]

Rule 25, as amended April 25, 1960, of the Rules of the United States Court of Appeals for the Second Circuit:

Petitions for Rehearing

(a) Time; Form. Any petition for rehearing shall be filed with the clerk of the court within 15 days from the filing of the opinion in the clerk's office. Unless otherwise ordered, the petition must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that it is presented in good faith and not for delay. Twenty-four copies of the petition shall be filed. An answer to a petition for

rehearing will not be received except by order of the court.

(b) Disposition. Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or sua sponte, shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argument and upon the papers then before the court, unless otherwise ordered.

(c) Effect on Issuance of Mandate. If a petition for rehearing be filed within the time herein limited, no mandate shall issue pending the disposition of said petition, except by special order of the court.

(d) Petitions filed for purposes of delay. If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding $100 against petitioner in favor of his adversary, to be collected with the costs in the case.

STATEMENT

(Unless otherwise indicated, all citations to the record refer to the indicated page or pages in the appendices originally filed by the respective parties in the Court of Appeals for the Second Circuit.)

In November, 1950, the Town of Fairfield advertised for bids on a group of eight sewer contracts for trunk and branch lines, including "Contract VIII" on which the petitioner from Newburgh, New York was the low bidder. Contract VIII was executed on February 19, 1951; and work started May 1, 1951.

Even a casual observer would have known this sewer would have to be constructed and operated under wet ground conditions (R. 1250a-54a, 1550a-51a). Neither Frank Totonelly himself, the petitioner's vice president and principal executive officer, or his superintendent on the job, Robert Quackenbush, or even his special trouble shooter, Charles Blair, had worked under comparably wet conditions or under specifications which put any limit whatsoever on the allowable infiltration of ground water into the lines (R. 1197a-98a, 1208a, 1275a). It was twenty-six year old Quackenbush's first job as superintendent (R. 1208a).

At least one of the Totonelly lines, Penfield Road at test point 8, leaked heavily and continually from the time it was laid in the summer of 1951 (R. 1206a, 1364a). The remainder leaked moderately from the beginning (Exhibit JJJ, R. 1742a). In the summer and fall of 1951 the contractor found and repaired some of these leaks. By the winter of 1951-1952, when construction pumping operations had stopped and the dry spell was ended, several of the lines leaked heavily (R. 115a, 1364a, 1370a). The first complete test of all the Contract VIII lines in June, 1952 revealed overall infiltration at a rate of more than 42,000 gallons per mile per day, as compared with the rate of approximately 5,000 gal-

lons per mile per day allowed by the specifications, for the pipe size used in Contract VIII (R. 996a, 998a, 1012a).

This infiltration would and did interfere with the proper use and operation of the sewer system. It meant there was less room in the Contract VIII lines available to carry live sewage. As a result, the line's live sewage capacity and its ability to meet the increased future demand resulting from continuing population growth were reduced. It meant increased operating cost and reduced capacity at the sewage treatment plant since all of the infiltrating ground water had to be pumped through the plant along with any live sewage. (See generally, R. 1320a, 1344a-46a).

Totonelly's superintendent, Robert Quackenbush, admitted that in the fall of 1951 the contractor had promised to return in the early spring to correct the infiltration (R. 1206a). But the contract completion date of January 15, 1952 (Exhibit 28, R. 1746a), came and went. It was not until March 31, 1952 after repeated requests by the Town, that any Totonelly representatives returned to Fairfield (R. 1370a-71a). Neither of the petitioner's original foremen ever returned to work in Fairfield (R. 1237a, 1261a). A few isolated repairs were made by a token force never exceeding four men; and towards the end of April, Quackenbush said his instructions were to stop all repair work other than lawn restoration in the vicinity of the installation (R. 969a). On April 21 the consulting engineers (Bowe, Albertson & Associates) advised the town to withhold future progress payments until the "work is brought to an acceptable status" (Exhibit DDD-2, R. 1728a), and

no further payments were ever made. In May, Philip Totonelly, president of the petitioner, told Kenneth D. Allen, Bowe Albertson's resident engineer, that his corporation "might just as well go broke the easy way", i.e., quit, go into bankruptcy, and let the bonding company take over and complete the contract (R. 1374a).

During the same period the petitioner had been building an apartment house project in Newburgh (R. 1199a, 1261a). This project and the petitioner were in serious financial difficulty by April 30, 1952 (R. 1200a, Exhibit 30, R. 1746a).

At a Fairfield Sewer Commission meeting on May 16, 1952, Frank Totonelly stated that his company did not intend to return to the job in order to make major repairs. The commission interpreted this as an abandonment of the contract and directed the engineers to send the petitioner a Notice of Warning under Sec. G 37 of the contract for failure to complete the work. It was sent on May 19 (R. 1728a-30a, Exhibit 23). In subsequent correspondence, the petitioner claimed it had not abandoned the contract, but there was no work in June or July. It was at this point, early in June, that the bonding company asked that the question of abandonment be held in abeyance pending the outcome of comprehensive weir tests (R. 1733a). It was these tests which showed excessive infiltration in 67 percent of the petitioner's sewer lines, and the engineers reported that the trouble was "defective workmanship without the customary follow-through by the contractor to correct his deficiencies" (R. 1733a-34a). On June 24 the commission was informed that the petitioner was represented by counsel (R. 1732a).

On July 28 the petitioner brought suit against the Town.

There were some further discussions and some self-serving letters from petitioner's counsel. Without prejudice to either party, the petitioner then stated it would "resume work" (Exhibit VV, R. 894a; see also Exhibits UU and WW, R. 892a-97a). At the end of August, the petitioner dug up a section on Penfield Road ostensibly to make repairs but actually in the hopes of establishing that the engineer had failed to specify a proper foundation for the soil conditions existing at that location and that as a result the sewer had settled out of proper line and grade (R. 1375a-76a). Instead it was established that 54 out of about 74 pipe joints examined were defectively made and leaking badly (R. 1380a). Mr. Allen, the resident engineer, testified that the joint compound had separated from the pipe because the pipe was wet or damp at the time of pouring and that larger holes or "voids" in the compound resulted from pouring it when it was too cold (R. 1380a-81a). Similar views were expressed by the compound manufacturer and a tile pipe representative at the time of the original exposure in August 1952 (Exhibit 92a, R. 1750a). Mr. Root, one of the petitioner's own experts, said the joints he saw showed bad workmanship (R. 1229a). Mr. Allen told the town (R. 1739a) and the petitioner's superintendent (R. 1385a) that the workmanship was defective. The petitioner had seen and heard enough. It repaired the exposed joints by adding cement collars (R. 1387a), buried the pipe (R. 1386a), made a half hearted attempt to get an extra work order for any further repairs (R. 898a-901a, 1739a-40a),

did a little cleaning up work and left town for good (R. 1386a). That was the end. A second Notice of Warning was sent on September 3, and at its September 10 meeting the commission voted to terminate the Totonelly contract (R. 1740a-41a).

Thereafter the Clark and Fray Construction Company which had successfully completed one of the companion sewer projects to Contract VIII, was engaged by the town to complete the repair work on Contract VIII. In the course of this repair work, the Totonelly lines were carefully exhumed (R. 1398a-99a, 1423a-24a) and endless examples of bad workmanship were found. Much trial time was devoted to a joint by joint description and explanation of the defects uncovered. From the nature of many of the defects it was self-evident that they had been created at the time of original installation by the petitioner (See e.g. R. 1395a, 1440a, 1439a, 1462a-7 & 8, 1419a, 1462a-37 to 39, 1568a, 1455a-57a, 1574a, 1567a-68a, 1581a-85a, 1600a, 1613a). The origin of the remaining defects was made equally clear by expert testimony (see generally the testimony of Kenneth D. Allen, William C. Fray, Louis J. Bacco, R. 1360a-1637a).

This suit was brought by the petitioner in the United States District Court for the District of Connecticut, on grounds of diversity of citizenship, to recover unpaid contract balances, claims for additional work, and damages for breach of contract. The Town filed a counterclaim for damages resulting from allegedly defective work by petitioner.

The trial before the district court, sitting without a jury, extended over 83 trial days. After entering

66 detailed findings of fact (R. 1126a-1173a), the district court concluded that the petitioner had not fulfilled its obligations under the contract and that its faulty workmanship had caused excessive infiltration of water beyond the allowable limits specified in the contract. The court accordingly dismissed petitioner's complaint and awarded $157,651.86 damages to the Town on its counterclaim.

The petitioner then appealed unsuccessfully to the United States Court of Appeals for the Second Circuit. From then on, the chronology of events was as follows:

June 30, 1961 — Court of appeals judgment entered.

July 19, 1961 — Order entered on stipulation extending deadline for requesting rehearing from July 15, 1961 to August 15, 1961 but specifically retaining June 30, 1961 as the starting point for the ninety-day period.

October 16, 1961 — Motion for leave to file petition for rehearing filed with copy of proposed petition attached (no copies served on respondent).

October 23, 1961 — Leave to file petition denied.

October 25, 1961 — Costs taxed against appellant and mandate to district court issued.

October 30, 1961 — Original record returned to district court.

November 9, 1961 — Petition itself denied because no active circuit judge had requested

that the case be reheard in banc as required by the local circuit court rules.

February 6, 1962 — Petition for certiorari filed.

ARGUMENT

1. This Case Has Been Properly Decided In The Light Of Connecticut Law And There Are No Grounds For Granting Certiorari.

Petitioner is seeking certiorari on the ground that, within the contemplation of Rule 19(b) of this Court, there has been a gross disregard of the applicable State law. Petitioner has included in its "Statement", pp. 3-11 of its petition, the particular points of Connecticut law which it claims the court of appeals and district court failed to apply to this case. A brief examination will show that each one of these alleged points of law is actually a disputed question of fact and nothing more. The petitioner is really asking this Court to retry the facts and this, of course, would not be proper.

The five so-called points of law are considered below in the order raised by the petitioner.

A. Claim that the Court substituted its opinion for a "determination" by the Engineers.

This claim sets up a straw man. It assumes that in 1951 there was a "determination" made by the engineers and binding on all parties that the petition-

er's workmanship was not defective. As a matter of fact, there never was any such "determination".

The petitioner apparently claims that the engineers' monthly payment certificates constituted a final and binding decision that all work covered therein had been performed with good workmanship in accordance with the contract. These certificates are the "approximate certificates" provided for in sec. G 31 of the contract (R. 826a). An examination of that section makes clear that the primary purpose of these certificates is to establish the **quantity** and not the **quality** of work done and materials used. Here the engineers are exercising a comptroller function and not the arbitrator function involved in many of the cases cited by the petitioner. If the approval of payments by issuance of monthly certificates constituted an acceptance of the work covered thereby, there would be no sense in contract sec. G 35 (b) permitting the withholding of "approved payments" where there is defective work. Indeed, even after final payment under sec. G 32 and G 33, the town could have required the petitioner to do "repairing, replacing, or rebuilding" under G 34 (R. 827a-828a). *See* **Milford v. O'Neil**, 8 Conn. Supp. 403, 418, (1940, unreported in Atlantic Reporter).

Compare **City of St. Charles v. Stookey**, 134 Fed. 772, 779 which involved not a sec. G 31 type approximate certificate, but a sec. G 32 type final certificate required to be made "when the contract is completed and tested to the satisfaction of the engineer and all repairs made"; and **Ashland Lime Salt and Cement Co. v. Shores**, 103 Wisc. 122, 81 NW 136, 138, wherein the contract specifically provided that monthly certificates would be issued only

for work which had been performed "in accordance with the contract" and "to the architect's satisfaction" and the court was obviously distinguishing those certificates from the G 31 type when it said that they "were not mere approximate estimates of the value of labor and materials brought into the building during the previous months, which under many authorities are subject to subsequent revision."

As the court below pointed out, the claim that there was binding approval of the petitioner's workmanship by the engineers during the progress of the job is further demolished by sec. G15 of the contract (R. 816a) which states:

> "Failure on the part of the Engineer or any of his authorized agents to detect inferior work or materials and condemn the same, shall not be construed to imply an acceptance of such work or materials; nor shall it be construed as barring the Municipality, at any subsequent time, from the recovery of such sum of money from the Contractor as may be needed to construct or build anew all portions of the work in which fraud was practiced, improper work executed, or improper material furnished and built into the work."

B. Claim that the Court held excessive infiltration per se was a breach of petitioner's contract.

This is another straw man. As the following excerpt (R. 1177a) from his opinion shows, the trial judge made no such decision (although respondent

believes he would have been fully justified in so doing):

> "The issue of the case is resolved by the finding of poor workmanship which was the cause of the failure of the sewer lines adequately to fulfill the purpose for which they were built **without particular regard to the limitation on the infiltration rate provided in the contract. Robinson v. U. S.**, 261 U. S. 490 (1923). The plaintiff relies heavily upon a Connecticut case, decided by the Superior Court, **Milford v. O'Neil Bros., Inc.**, 8 Conn. Supp. 403; That case is distinguishable from the present case in many respects. It is sufficient, however, to point out that in the **O'Neil** case there was no evidence of defective workmanship or of the use of defective materials by the contractor." (Emphasis added)

Here again, there is no real question of law, Connecticut or otherwise, involved. It is painfully clear that the petitioner is really attempting to attack the trial court's factual finding of massive bad workmanship. As Judge Hincks said in the appeal below (Petition, p. 8a):

> "In short, it is the law of Connecticut that the plaintiff here must fail if it is established that the excessive infiltration was caused by his defective workmanship. And here, the record is replete with evidence of faulty workmanship from which the inference of the causal relationship was fully justified."

C. Claim that the Town breached the contract by placing a bulkhead in the sewer line.

Here again there is nothing particularly wrong with the law cited by the petitioner, but it has no application to the facts of this case. Under the contract, the town had a perfect right to install the bulkhead to hold back the petitioner's excess water since, contrary to secs. G 5 and D 8 of the contract (R. 810a and 847a), the petitioner was draining it into the pipes of the adjacent contractors who were building the trunk sewer and the treatment plant. Furthermore, there was no evidence that the bulkhead had actually caused any damage to the petitioner's sewer pipes or interfered in any way with its completion of the contract, and this fact is reflected in the trial judge's findings Nos. 25, 26, and 27 (R. 1133a-1134a).

D. Claim that the Town wrongfully terminated the contract.

This claim also only involves questions of fact. The petitioner claims that the town repudiated the contract some time in the summer and fall of 1952. The trial court found that in effect the petitioner, not the town had earlier abandoned the work and "repudiated its duties under the contract" on May 27, 1952, and it further found the facts surrounding the Aug. 1952 opening of the Penfield Road sewer quite differently from petitioner's version (findings Nos. 36-49, R. 1136a-1139a). For example, page 9 of the petition claims that when the Penfield Road sewer was exposed, "no defects in workmanship were found," whereas the trial court found that there were

separations and openings in the pipe joints which were repaired by adding cement collars (Finding No. 45, R. 1138a).

E. Claim that Town's improper termination of the contract made the evidence of subsequently discovered bad workmanship inadmissible.

To state this claim is to demonstrate its frivolity. Not only is it a questionable and incomplete statement of the law, but it assumes that the town improperly terminated the contract whereas the trial court found otherwise.

2. The Petition for Certiorari must fail because it was not filed within the required 90 days.

It is clear that the ninety day time limit for filing a petition for certiorari contained in 28 USC Section 2101(c) is jurisdictional and this court has no power to entertain a petition filed after the expiration of the ninety day period. Robertson & Kirkham, **Jurisdiction of the Supreme Court of the United States** (1951 ed.) Section 409, pp. 821-22.

Whether the petitioner here has met the ninety day requirement depends on whether its attempt to obtain a rehearing by the Circuit Court of Appeals tolled the running of the ninety day period and started it anew. As conceded in the middle paragraph of page 12 of E. Totonelly Sons, Inc.'s petition, the ninety day period clearly had not been tolled by anything occurring through October 23, 1961. By

then the fifteen day time for filing a petition for rehearing under Rule 25 of the Court of Appeals for the Second Circuit (as extended by stipulation to August 15, 1961) had expired, and the time for appeal to this Court (i.e., the time for seeking certiorari) had also expired.

In these circumstances under the older cases, this Court clearly would have no jurisdiction to entertain this petition for certiorari. See **e.g., Conboy v. First National Bank**, 203 U. S. 141, 51 L. ed. 128 (1906); **Morse v. U. S.**, 270 U. S. 151, 153-54, 70 L. ed. 518, 520 (1926).

Some of the unanswered questions in this area of appellate jurisdiction were later covered in **Wayne United Gas Co. v. Owens-Ill. Glass Co.**, 300 U. S. 131, 137, 81 L. ed. 557, 561 (1937) which recognized the power of a bankruptcy court to "entertain" an untimely petition for rehearing and to thereby extend the time for taking an appeal. However, in the **Wayne** case there could be no question about whether the petition was "entertained" because it was granted and there actually was a rehearing, and the court made it very clear that:

> " . . . the application for rehearing, if the Court refuses to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed."

In still more recent years, there has been a tendency to confine what might be called the more liberal "entertainment"-of-motion test of the **Wayne** case to bankruptcy cases. See anno, "Appeal-Time-

Motion for Rehearing", 10 ALR 2d 1075, 1077; **Safeway Stores v. Coe,** 78 App. D.C. 19, 136 F 2d 771 (1943); and **Nealon v. Hill,** 149 F. 2d 883 (CA 9th, Ariz. 1945), cert. den. 326 U. S. 753, 90 L. ed. 451. Even in bankruptcy cases it is sometimes ignored, **e.g., Fowler v. Smiser,** 274 F.2d 335, (CAIO, Okla.) cert. den. 362 U. S. 988, 4 L. ed. 2d 1022, and other times the test is applied but applied strictly enough so that no extension of time results, **e.g., Pfister v. Northern Ill. Finan. Corp.,** 317 U. S. 144, 87 L. ed. 146 (1942); **Bernards v. Johnson,** 314 U. S. 19, 31, 86 L. ed. 11, 19; **Klein's Outlet, Inc. et al v. Lipton,** 181 F. 2d 713 (CA 2); cert. den. 340 U. S. 883, 95 L. ed. 612.

Furthermore, even if the "entertainment" test applies equally to non-bankruptcy situations, it is clear that the Court of Appeals for the Second Circuit never "entertained" E. Totonelly Sons, Inc.'s petition for rehearing.

As was said in the **Klein's** case supra, 181 F. 2d at 714,

> "Entertainment of the motion apparently means that the court considers on the merits the ground for rehearing asserted in the motion."

The **Klein's** case involved what had been treated by the District Judge as a motion to reargue. It had been filed within the applicable time limit but it was under consideration for about one month and was not decided until after the time had expired. In a memorandum decision denying the motion, District Judge Holtzoff stated:

> "No reason appears for further consideration of this matter by this Court. The order heretofore made will stand."

After quoting the above decision, Judges L. Hand, Swan and Chase held per curiam:

> "It is clear from Judge Holtzoff's memorandum opinion that he did not 'entertain' the motion."

In the present case, the petitioner puts great stress on the fact that the formal judgment file signed and presumably prepared by the clerk recites that the November 9, 1961 denial of the petition for rehearing was "upon consideration thereof."

In cases where the petition was held to have been "entertained", something more than mere "consideration" is involved. For example, in **Ribaudo v. Citizen's National Bank,** 261 F. 2d 929 (CA 5th, Fla.), the court noted that the judge below had **"heard** the petition for rehearing and considered it after being **fully advised"** (emphasis added); and in **Bowman v. Loperena,** 311 U. S. 262, 264, 85 L. ed. 177, 179 (1940), cited by the present petitioner, the judge below had endorsed on the petition for rehearing that it had "been 'seasonably presented' and entertained' by the above entitled court" and thereafter there was a hearing and a written opinion.

It would be a travesty, if mere "consideration" of an untimely petition amounted to its being "entertained". This court used the following language to make this very point clear in **Pfister v. Northern Ill.**

Fin. Corp., supra, 317 U. S. at 150-151, 87 L. ed. 151-152:

> "On the other hand, where out of time petitions for rehearing are filed and the referee or court merely considers whether the petition sets out, and the facts — if any are offered — support grounds for opening the original order and determines that no grounds for a re-examination of the original order are shown, the hearing upon or examination of the grounds for allowing a rehearing does not enlarge the time for review of the original order. This result follows from the well-established rule that where an untimely petition for rehearing is filed which is not entertained or considered on its merits the time to appeal from the original order is not extended.
>
> "If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out-of-time petition would be enough. Of course, the court must examine the petition to see whether it should be granted. Indeed the examination given a motion to file such a petition might just as well be said to justify the advancement of the time for review. It is quite true that in a petition for review upon the ground of error in law in the original order, the examination of the grounds of the petition for rehearing is equivalent to a re-examination of the basis of the original decree. But in such a case the order on the petition for review would control. It would show either a refusal to allow

the petition for rehearing or a refusal to modify the original order. Cf. Wayne United Gas Co. v. Owens-Illinois Glass Co. 300 US 131, 137, 138, 81 L ed 557, 561, 562, 57 S Ct 382, 33 Am Bankr Rep (NS) 1. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

"In the present case it is quite plain the denial was grounded upon a failure of the petitions for rehearing to establish adequate grounds for the re-examination of the original orders."

In the present case, as in **Pfister,** it is clear the petition was "considered" but not "entertained". To fully understand the situation it is necessary to refer to the excerpt from the rules of the Court of Appeals for the Second Circuit which is printed on p. 2 of this brief. Chief Judge J. Edward Lumbard's memorandum of decision dated November 9, 1961 and the formal order entered pursuant thereto by the Clerk (reproduced respectively on pp. 3a and 4a of the present petition) gives no indication that the petition for rehearing was entertained on the merits. It specifically gives as the reason for the denial the fact that no active circuit judge requested a rehearing. Under Rule 25 above, it would only be after such a request that the Chief Judge would "cause that issue [i.e. the issue of whether there should be a rehearing] to be determined by the active judges". Such a "determination" would probably amount to "entertaining" an untimely petition for rehearing, but the proceedings in this case never went that far because not even one of the active judges was "of the opinion that the case should be reheard in banc".

It is certainly significant that on October 25, 1961, two days after denial of the motion for leave to file a petition for rehearing, the mandate to the district court was issued and costs were taxed against the appellant. It is also significant that the original record was returned to the district court on October 30, 1961 so it was not even available to the court of appeals on November 9, 1961 when the final coffin nail was driven into the petition for rehearing. Obviously on November 9 the court was not "entertaining" the petition, it was simply completing the official record so it would be clear no potential escape hatches still remained open under local Rule 25.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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